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No. 96-1080

# In the Supreme Court of the United States

OCTOBER TERM, 1996

BRIAN KEVIN CLEMENT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

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10 pp

## QUESTION PRESENTED

Whether petitioner is entitled to a reversal of his conviction under 18 U.S.C. 922(a)(5) and 924(a)(1)(D) because the trial court, without objection, failed to instruct the jury that the requirement that petitioner "willfully violate[d]" the law meant that he acted with knowledge that his conduct was illegal.

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on August 21, 1996. A petition for rehearing was denied on October 8, 1996 (Pet. App. A6-A7). The petition for a writ of certiorari was filed on January 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of transferring firearms to persons he knew or had reasonable cause to believe resided in another State, in violation of 18 U.S.C. 922(a)(5) and 924(a)(1)(D). He was sentenced to 30 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A1-A5.

1. Between 1990 and 1994, petitioner bought 11 semi-automatic handguns in North Carolina and transferred nine of them to his father and four brothers in New York. An ATF agent traced to petitioner one handgun that had been seized from a person arrested in New York City. When questioned about the weapon, petitioner confessed to transferring that and the other weapons to his father and brothers. Pet. App. A2.

2. Section 922(a)(5) prohibits the transfer of "any firearm to any person * * * who the transferor knows or has reasonable cause to believe does not reside in * * * the State in which the transferor resides." Although Section 922(a)(5) does not contain a "willfulness" element, the penalty provision under which petitioner was punished—18 U.S.C. 924(a)(1)(D)—requires a showing that the defendant "willfully violate[d]" Section 922(a)(5). See Pet. 2-3 (quoting Sections 922(a)(5) and 924(a)(1)(D)). At petitioner's trial, the district court, applying circuit precedent, see *United States* v. *Collins*, 957 F.2d 72 (2d Cir.), cert. denied, 504 U.S. 944 (1992), instructed the jury that, "[t]o find that [petitioner] acted willfully, the Government must prove beyond a reasonable

doubt that [petitioner] acted knowingly and purposefully and that [petitioner] intended to commit an act which the law forbids." Pet. 4 n.2; see Pet. App. A3. Petitioner did not object to that instruction. Pet. 4.

3. On appeal, petitioner argued for the first time that the "willfully violates" requirement of Section 924(a)(1)(D) requires a showing that a defendant acted with knowledge that his conduct was illegal, and that the district court's failure to instruct the jury to that effect was reversible error. Petitioner argued that *Collins* was wrongly decided and that it "must be reconsidered in light of *Ratzlaf* [v. *United States*, 510 U.S. 135 (1994)]." Pet. App. A3. *Ratzlaf*, which was decided before petitioner's trial, see *ibid.*, construed the "willfully violating" requirement in prosecutions for structuring monetary transactions in violation of 31 U.S.C. 5322(a) and 5324(3) (1988) to require knowledge that the prohibited transaction was illegal.

In an unpublished opinion, the court of appeals determined that the precedential validity of *Collins* after *Ratzlaf* "is a difficult issue that we need not reach" because petitioner failed to object to the district court's instruction on willfulness. Pet. App. A3. Applying plain-error review under Federal Rule of Criminal Procedure 52(b), the court held that reversal would be warranted only if there were error "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." Pet. App. A3. The court concluded that any error here did not meet that standard because, at the time of petitioner's trial, "the district court's jury instruction was completely consistent with a controlling Second Circuit precedent," which the Second Circuit has followed (without addressing the issue presented here) "even after the

*Ratzlaf* decision." *Id.* at A3-A4 (citing *United States* v. *Ali*, 68 F.3d 1468, 1473 (1995), modified on reh'g on other grounds, 86 F.3d 275 (2d Cir. 1996)).[1]

**DISCUSSION**

Petitioner contends (Pet. 6-7) that this Court should resolve a conflict in the circuits on whether a conviction under 18 U.S.C. 924(a)(1)(D) for "willfully violat[ing]" 18 U.S.C. 922(a)(5) requires proof of knowledge of illegality. Several courts of appeals have held, in the wake of *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), that the "willfulness" element in prosecutions under 18 U.S.C. 922(a)(5) and 924(a)(1)(D) requires a showing that a defendant acted with knowledge that his conduct was illegal. See *United States* v. *Sanchez-Corcino*, 85 F.3d 549, 552-553 (11th Cir. 1996); *United States* v. *Hayden*, 64 F.3d 126, 130 (3d Cir. 1995); *United States* v. *Obiechie*, 38 F.3d 309, 315 (7th Cir. 1994); see also *United States* v. *Hern*, 926 F.2d 764, 767 & n.6 (8th Cir. 1991). In a pre-*Ratzlaf* decision, the Second Circuit has held to the contrary. See *United States* v. *Collins*, 957 F.2d 72 (2d Cir.), cert. denied, 504 U.S. 944 (1992). The court of appeals declined, however, to reach the "hard question" whether, after *Ratzlaf*, *Collins* should be reconsidered. See Pet. App. A3. Because petitioner failed to object at trial, the court held narrowly that the district court's instruction, which was consistent with *Collins*, did not constitute "plain error" under

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[1] Petitioner acknowledges (Pet. 8 n.5) that *Ali* "did not present the question that is central to this case—the meaning of 'willfully violated' in section 924(a)(1)(D)—and the issue was not briefed to or addressed by the *Ali* Court." Instead, *Ali* appeared to involve a complete failure to issue any instruction on the element of willfulness. See 68 F.3d at 1473.

Fed. R. Crim. P. 52(b). See Pet. App. A3-A4. Resolution of the plain-error issue would not necessarily resolve the conflict in the circuits raised by *Collins*.[2] Moreover, the court's holding on plain error was correct and does not conflict with any decision of another court of appeals.

1. Rule 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." That Rule entitles a defendant to relief only if he can make four distinct showings. The defendant must establish that the district court committed (1) an "error" (2) that was "plain," "clear," or "obvious" and (3) that affected his "substantial rights." *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993). Fourth, even when those showings are made, "Rule 52(b) is permissive, not mandatory," *id.* at 735, and a reviewing court may exercise its "discretion" to reverse a conviction for plain error only "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,'" *id.* at 736.

Here, the court of appeals rejected petitioner's plain-error claim without reaching the issue of whether the jury instruction on willfulness was erroneous because the court concluded that there was no error "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite [petitioner's] failure to object." Pet. App. A3; see generally *United States* v. *Frady*, 456 U.S. 152, 163 (1982). The court explained that, in the Second Circuit, it was unclear at the time of trial—and is still

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[2] Indeed, until the Second Circuit addresses the continuing validity of *Collins* in light of *Ratzlaf*, it is unclear whether any circuit conflict will persist on the question presented.

unclear today (see Pet. App. A3)—whether a Section 922(a)(5) defendant is entitled to the willfulness charge that petitioner belatedly claims he should have received. By the time of petitioner's trial, this Court had already decided *Ratzlaf*, the principal authority on which petitioner bases his challenge to the continued validity of *Collins*.[3] Since petitioner's trial, no intervening decision of this Court or the Second Circuit has resolved the tension that petitioner perceives between *Ratzlaf* and *Collins*. Thus, whether or not Rule 52(b) permits relief in the "special case where [an] error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified," *Olano*, 507 U.S. at 734, the "error" (if any) that petitioner alleges was plain neither at the time of trial nor at the time of appeal. It therefore does not warrant reversal under the plain-error rule. See *Olano*, 507 U.S. at 734.

2. Although we believe that this petition could appropriately be denied before disposition of *Johnson* v. *United States*, No. 96-203 (argued Feb. 25, 1997), this Court may nonetheless wish to hold the petition pending its decision in that case. Here, as in *Johnson*, petitioner characterizes the error at issue as a "fail[ure] to instruct the jury on an element of the crime," Pet. 12, and suggests that such errors automatically require reversal even where a defendant did not object at trial, see Pet. 12-13 (citing cases involving other criminal offenses). Although here, unlike

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[3] For that reason, it is not clear that petitioner is correct in claiming (Pet. 11-13) that a trial objection based on *Ratzlaf* would have been "futile." The Second Circuit itself noted that, after *Ratzlaf*, the precedential status of *Collins* presents a "difficult issue." Pet. App. A3.

*Johnson*, there is no intervening precedent that establishes that the court of appeals committed error, this Court's resolution of the plain-error issue in *Johnson* could bear on the proper disposition of this case.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Johnson* v. *United States*, No. 96-203, and then disposed of accordingly.

Respectfully submitted.

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